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June 1, 1999

BY HAND DELIVERY

Magalie Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, **CC Docket No. 96-128 NSD File No. L-99-34**

Dear Ms. Salas:

Please find enclosed for filing an original and four copies of the "Reply Comments of the RBOC/GTE/SNET Payphone Coalition on Its Petition for Clarification" in the above-captioned proceeding.

Please date-stamp and return the extra copy provided to the individual delivering this package.

Sincerely,

Michael K. Kellogg

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	File No. NSD-L-99-34
	)	

REPLY COMMENTS OF THE RBOC/GTE/SNET PAYPHONE COALTION ON ITS PETITION FOR CLARIFICATION

SUMMARY AND INTRODUCTION

The RBOC/GTE/SNET Payphone Coalition (the "Coalition") hereby replies to the Comments filed in opposition to its Petition for Clarification in the above-captioned proceeding. Those comments provide further evidence that the Commission's current rules are subject to manipulation and misinterpretation by IXCs who continue to prefer a free ride (or reduced fare) to an efficient per-call compensation regime. The prior comments of the Coalition in this Docket — and further examples offered below — provide a vivid illustration of the frustrations and expense that PSPs face in attempting to collect the compensation that is due them under the Act and the Commission's rules. The APCC's Comments in this proceeding underline those problems.

The Commission should address this situation, first of all, by clarifying its current rules: those rules provide that the IXC responsible for payment of per-call compensation is the owner of the first switch, unless a switch-based reseller affirmatively identifies itself as the party responsible

for the calls carried over its switch. The Commission can and should issue that clarification immediately pursuant to its authority under section 1.2 of its rules.

On a prospective basis, the Commission should abandon its regime of shifting responsibilities and place the obligation for payment squarely on the CIC assignee. That rule is clear, it is administrable, it is verifiable, and it builds on existing network structures. No IXC contests that the Coalition's CIC solution promotes certainty and clarity. Instead, the sole objection raised to the system is that the carrier responsible for compensation will not always be the same carrier that tracks when a given call is completed. This objection is not wholly unfounded — even the CIC solution is not perfect. But the CIC solution is nonetheless a significant improvement over the current morass, not only because the party responsible for payment is more likely to be able to track the call, but also because the clarity of the rule promotes market-driven allocation of payment and tracking responsibility to the most efficient party.

Several parties insist that the CIC solution may only be implemented as a new rule, following federal register publication of a notice of proposed rulemaking. We do not agree. Under the circumstances, however, there is no reason for the Commission to take chances. The Coalition therefore believes it would be advisable for the FCC to republish its notice in the Federal Register and proceed to adopt the CIC proposal as a rule as quickly as possible.

ARGUMENT

I. THE CURRENT RULES ARE BEING ABUSED

The Coalition's Petition for Clarification offered two principal justifications for the proposed interpretation of the Commission's rules. First, the current system has frustrated PSPs' earnest efforts to achieve anything close to full compensation because of uncertainty, inefficiency, and regulatory gamesmanship (or worse) on behalf of many IXCs. Second, by making it clear that the CIC assignee is responsible for payment of per-call compensation, the Commission will promote certainty, ease reconciliation of payment obligations, and permit the market to allocate payment and tracking responsibility efficiently.

The Comments filed in response to the Coalition's Petition vividly illustrate the first of these points by contradicting one another (and the Commission's existing rules) in their various accounts of which carriers are responsible for what. For example, TRA insists that "only those resale carriers which expressly certify to their underlying facilities-based carrier that they are switch-based" are responsible for per-call compensation. TRA at 11 n.38. Yet Frontier insists that "[a]n underlying carrier is only responsible for the payment of compensation on behalf of its switchless resale customers." Frontier at 2.

Nor do the IXCs display any greater consistency in explaining when, as a threshold matter, a reseller has sufficient "switching capability" to undertake responsibility for per-call compensation. Instead, IXCs offer a variety of proposed definitions. For Qwest, the key is that the reseller be able to "use the SS7 information [sent by the first-switch owner] to identify and pay for all compensable payphone calls." Qwest at 5. But Qwest does not explain how it knows whether a reseller is able to process SS7 information and when therefore it is appropriate for

Qwest to decline to pay for a given call.[1] MCI WorldCom sets up a three-prong test: a reseller takes over payment responsibility only if the reseller "has the ability to determine whether a call originated from a payphone, whether an access code has been used to make the call, and whether a payphone call has been completed." MCI WorldCom at 2. But, again, there is no explanation as to how MCI WorldCom knows that a reseller has these capabilities.

Sprint has yet another view: it states that "it is the possession of switching capability that constitutes the dividing line between carriers that are responsible for tracking calls and compensating PSPs, and those that are not required to do so." Sprint at 2. But Sprint does not even attempt to define "switching capability," and its statement strongly suggests that it would include many resellers in this definition who have no ability to determine that a call was made from a payphone or even that a call has been completed. Indeed, Sprint does not even acknowledge that many resellers carry some calls through their own switch and other calls as switchless resellers. Sprint does not explain how or whether it can distinguish the two situations, or whether it is paying compensation in the latter case — though it is clearly obligated to do so.

As the Coalition has maintained from the beginning, there is no standard industry understanding of the term "switching capability," nor have the IXCs acted to ensure that only those carriers that have tracking capability are permitted to relieve the first-switch carrier of payment responsibility. For this reason, as the APCC notes, "a facilities-based carrier and its reseller customer may each determine that it is *not* responsible for paying compensation for calls

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[1]Moreover, in the case of at least one Coalition member — GTE — Qwest has never ordered Flex ANI, so even if resellers are capable of processing the Flex ANI information, they would not receive it from Qwest.

to a particular number, with the result that neither the facilities-based carrier nor the reseller tracks the calls." APCC at 7.

Several IXCs attempt to argue that the Commission should do nothing since the present situation presents no real problems. See MCI WorldCom at 4 ("The revenue shortfall presented by the Coalition is nothing but a symptom of the Coalition's limited willingness to approach facilities-based resellers for compensation."); Sprint at 4-5 ("[I]t is not at all clear to Sprint whether the RBOCs' alleged difficulty in collecting all the compensation they are due is a real problem."); Cable & Wireless at 4; Frontier at 4; TRA at 6-7. This argument is as brazen as it is false. Evidence that the Coalition has submitted in this docket establishes that unpaid compensation is running at fifteen percent of total compensation due, even without taking account of amounts that are owed by carriers such as MCI and Frontier that have refused to make any payments to Coalition PSPs in several states. See Letter of Michael K. Kellogg to Craig Stroup, CC Docket 96-128 (Jan. 8, 1999) (uncollectibles of 14.4 percent); see also APCC Petition for Partial Reconsideration at 14 (filed Dec. 1, 1997) (stating that about 8 percent of per-phone compensation was uncollectible, and predicting that the amount would rise under a per-call compensation regime).

Moreover, Coalition members report that further collection efforts — undertaken at considerable expense — have yielded only obstruction or defiance by many IXCs. Bell Atlantic has invoiced 1200 carriers for the fourth quarter of 1998; fewer than 50 paid anything. Bell Atlantic's shortfall in compensation for all of 1998 runs at 30 percent of expected revenues. BellSouth too has sent invoices to between 1100 and 1200 carriers. Only 68 IXCs have paid anything at all since the per-call compensation regime began; BellSouth's shortfall exceeds 22

percent of expected revenues. Of more than 600 carriers contacted by Ameritech, only 59 are paying compensation. SBC has received payment from only 40 IXCs. And many of the carriers who are paying something pay much less than the PSPs believe that they owe.

IXCs blithely suggest that if PSPs are dissatisfied with the current pace of payment, they should "file a formal complaint with the Commission." Qwest at 5; see Frontier at 4 (PSPs should "resort to the usual collection remedies"). The fact is that complaints against carriers who have paid nothing were first filed in the Commission in *July 1998* and still have not been resolved. (This despite Commission assurances that it would "aggressively take action on . . . complaints" concerning "a carrier's wilful failure to pay compensation." See First Report and Order,[2] 11 FCC Rcd at 20598, ¶ 114.) The prospect of flooding the Commission with hundreds of complaints simply to collect compensation that is mandated by law should not only spur the Commission to action, it serves to underline the inefficiency of the current system. Of 530 IXCs that will receive invoices from SBC, a full 85 percent owe per-call compensation estimated at $5,000 or less.[3] Collectively, this adds up to millions, but the expense of enforcing obligations against each of the recalcitrant IXCs may well consume the lion's share of the amounts they owe.

The root of these problems is that many IXCs have misread the Commission's rules in an effort to prevent easy identification of the IXC responsible for any given call. Because of the uncertainty this has generated, even well-meaning carriers may fail to pay for calls for which they

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[2]Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 20541 (1996).

[3]By contrast, Coalition filings in this docket indicate that the top ten CIC assignees account for nearly 96 percent of the traffic originated on Coalition payphones; the top 20 carriers account for over 98 percent of that traffic. See Letter of Michael K. Kellogg to Rose M. Crellin, CC Docket 96-128 (Mar. 26, 1998).

are responsible, and unscrupulous carriers can simply "keep their heads down," or pay far less than they owe, with a reasonable chance that they can claim confusion when the day of reckoning comes (if it comes).

MCI and Sprint suggest that IXCs may provide the data that would permit PSPs to identify switch-based resellers that have undertaken payment responsibility for traffic sent through their switch. To the extent that a reseller contests that it owes anything at all because it does not have a switch, such information can provide some help. But to the extent that PSPs are being undercompensated for calls routed to MCI and Sprint, the information is little better than useless. That is because, to date, the crucial information is which reseller is responsible for *specific calls*. Otherwise, a PSP has no way of knowing whether a given reseller is responsible for 100 calls, or 100,000. Coalition members, including BellSouth and SBC, have requested this information from MCI, sending it lists of 800 numbers called from payphones for purposes of identifying the responsible carrier. So far, MCI has not delivered the information.

There is no justification for allowing this state of affairs to continue when a solution is within the Commission's grasp.

II. THE COMMISSION SHOULD CLARIFY ITS EXISTING RULES

The Coalition has already explained that under the Commission's current rules, the owner of the "first switch" to which a compensable call is routed from the local network serving the PSP is liable for per-call compensation unless some other carrier expressly identifies itself to the PSP as having the obligation and actually undertakes to pay per-call compensation. The Commission should issue this clarification now, to "terminat[e] [the] controversy" over the carrier responsible for per-call compensation under the Commission's current interpretation. 47 C.F.R. § 1.2.

As the Coalition has explained before, this is the only reading consistent with existing rules. Section 64.1300(a) requires that "every carrier to whom a completed call from a payphone is routed shall compensate the payphone service provider. . . ." Id. § 64.1300(a). Thus, the owner of the facilities to which the local exchange carrier delivers the payphone call is obligated to pay the compensation. Under this rule, the facilities-based carrier, rather than a reseller, must pay. As the Commission explained, "Although we have concluded that the primary economic beneficiary of payphone calls should bear the burden of paying compensation for these calls, we conclude that, in the interests of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers." First Report and Order, 11 FCC Rcd at 20586, ¶ 86.

Some facilities-based carriers, however, subsequently pointed out that some resellers actually have their own facilities that could be used to track and measure their compensation obligations. As a result, in its Order on Reconsideration,[4] the Commission held that "a carrier is required to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier." 11 FCC Rcd at 21277, ¶ 92. At the same time, "[i]f a carrier does not maintain its own switching capability, then . . . the underlying carrier remains obligated to pay compensation to the PSP in lieu of its customer that does not maintain a switching capability." Id.

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[4]Order on Reconsideration, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 21233 (1996).

This refinement stated in the Order on Reconsideration does not mean that the facilities-based carrier may simply decide on its own to stop paying compensation. That carrier is relieved of its obligation to pay only when the reseller explicitly accepts the obligation to pay. As the Common Carrier Bureau found earlier, some "facilities-based IXCs . . . are not required to pay compensation on particular 800 number calls because their switch-based resale customers have identified themselves as responsible for paying the compensation . . . ." Memorandum Opinion and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 13 FCC Rcd 10893, 10915-16, ¶ 38 (1998) (emphasis added). If the reseller does not identify itself and expressly undertake to pay per-call compensation, then the facilities-based carrier remains liable to the PSP.

The significance of the first switch is all the clearer because the Commission repeatedly conditioned a PSPs' very ability to demand per-call (as opposed to per-phone) compensation on whether payphone-specific coding digits were available from the payphone in question. See, e.g., id. at 10893-94, ¶ 1. It is only the first switch owner who can order Flex ANI and who can ensure that the digits are passed on to succeeding switch-based resellers. A system in which a switch-based reseller would be required to pay per-call compensation even though it could not receive Flex ANI digits due to the IXCs' technical limitations would be self-contradictory. Thus, the Commission clearly intended that the first-switch carrier would be responsible for calls, unless the switch-based reseller undertook the responsibility, secure in its ability to perform the required tracking functions.[5]

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[5]Frontier claims that the proposed clarification would be contrary to the Act and to the D.C. Circuit Court's decision in Payphones I. Frontier at 5-7. Frontier's arguments are frivolous. Section 276 requires that compensation be paid on each and every completed call; it does not

III. THE CIC PROPOSAL IS THE BEST SOLUTION AVAILABLE

The Coalition believes that on a going-forward basis, the CIC solution entails several advantages over the current solution of shifting responsibilities. As the Coalition argued in its Petition, the Commission's distinctions — among facilities-based carriers and switch-based and non-switch-based resellers — do not correspond to the way in which calls are routed and tracked within the telephone network. Using the CIC associated with the compensable call to assign per-call compensation payment obligations alleviates that problem.

As an initial matter there is simply no way for any carrier to argue that the CIC solution is unworkable. *It is working.* AT&T states that it "typically uses this method to calculate its payphone obligations." AT&T at 1. For this reason, it has "no objection to a rule which embodies this practice." Id. It is no surprise that AT&T is one of the most reliable carriers in terms of payment of compensation on access code and subscriber 800 calls.

Moreover, no carrier takes issue with the Coalition's account of the advantages of the CIC approach. As the Coalition pointed out in its Petition, "For each 800 call routed from the local exchange network, there is an associated CIC . . . . Notably, for each call, the CIC is unique. . . . Moreover, the CIC is already used to bill charge for access to the local network." Coalition Petition at 4. The CIC associated with a given call is also available to PSPs — either from the

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require that the IXC who "completes" the call be the party with payment responsibility. As for Frontier's reliance on the Court's decision to vacate the Commission's interim compensation regime, Frontier's analogy is wholly unconvincing. The Court vacated the Commission's allocation of interim compensation payments not because of the way that payment was allocated among carriers involved with a given call, but because the Commission wholly exempted certain carriers, but not others, from payment obligations. See Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555, 565 (D.C. Cir. 1997).

LEC (though not all LECs offer this type of call detail service) or from independent database providers.

IXCs nonetheless complain that the CIC solution will be flawed because it will mean that in some instances the carrier with payment responsibility will not be certain whether a given call is actually completed. See MCI at 5-8; Sprint at 3-4; Cable & Wireless at 6-7. This problem is evidently not insurmountable; AT&T has used the CIC methodology for tracking and does not object to its adoption as the FCC's rule. Moreover, the IXCs do not explain why it is impossible for them to track call completion on all calls they carry.

Indeed, there can be no dispute that in the case of subscriber 800 and 101XXXX access code calls, carriers have no difficulty identifying completed calls. The only circumstance in which the CIC assignee may have difficulty identifying completed calls is when a switch-based reseller uses an 800 access code. And what the IXCs leave unspoken is that under current rules the same situation arises whenever a facilities-based carrier is responsible for the per-call compensation payments of a switch-based reseller who has not undertaken payment responsibility for the calls sent through its switch.

In any event, there are several answers to this problem, to the extent it exists. Most important, the switch-based reseller has a contractual relationship with the CIC assignee, and the parties can agree to share information concerning completed calls. To the extent that disagreements might arise between the PSP and the CIC assignee concerning the number of calls that have been completed, the CIC assignee can obtain the agreement of the switch-based reseller to document its call completion reports. Or CIC assignees and PSPs could agree to use a timing

algorithm to determine the number of completed calls where the CIC assignee does not have actual call completion information.

The point here is that where a legal rule is clear, the parties can easily contract around any residual technical obstacles to achieving 100% accuracy. Indeed, AirTouch Paging endorses such market solutions, noting that "all carriers of a compensable payphone call will have reached agreements among themselves regarding responsibility for payment." AirTouch at 2. That is precisely the Coalition's point: so long as payment obligations are clear, it is easy for the most efficient party to take responsibility for tracking the call and paying compensation. The Coalition believes that in the vast majority of cases, that carrier will be the CIC assignee. But if and when it is not, the CIC assignee has every reason to reach agreement with the carrier that is best situated to ensure that the CIC assignee meets its obligations in the most economical fashion, for that party can perform the function most cheaply and earn a fair return besides.[6]

The only IXC to support the solution — AT&T — is the carrier that is best living up to its obligation to pay compensation on access code and subscriber 800 calls. Moreover, it does so by employing the very methodology that the Coalition has proposed. The remainder of the IXC industry — from small resellers to industry giant MCI WorldCom — oppose the CIC solution. One does not have to be cynical to infer that the industry sees that the CIC solution will raise total

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[6]TRA complains that requiring small switchless resellers who have their own CICs to pay compensation would place a burden on those carriers. TRA at 9-11. This is plainly wrong. As TRA must concede, "small switchless resale carriers . . . could contract with their network service providers" to perform compensation tracking. Id. at 10. Indeed, that is presumably what is already happening, for it is certain that facilities-based IXCs are not paying switchless resellers' per-call compensation obligations for free. If the new system would be more burdensome on small switchless resellers, it is only because the system would hold them accountable more accurately.

industry costs *by significantly reducing total underpayment of per-call compensation.*[7] Either facilities-based carriers or their resale customers are paying far less than they owe under the current system, whether deliberately or through plain confusion. PSPs, and the callers who depend on them, are being cheated, and the credibility of the Commission's per-call compensation regime suffers immeasurably. The Coalition's CIC proposal will help to set the situation right.

* * * * *

Finally, a procedural note. Several of the IXCs argue that the Commission should not adopt the Coalition's proposal without a rulemaking.[8] In all likelihood, the Commission could enact the proposed clarification of its existing rules without prior publication in the federal register. See 47 C.F.R. § 1.2; 5 U.S.C. § 553(b)(A). On balance, however, the Commission should not run the risk that a reviewing court will see this clarification as a sufficiently significant departure from the Commission's prior statements to require a rulemaking procedure. For this reason, the Coalition believes that the Commission should republish its notice in the Federal Register, with the shortest allowable deadlines for comment. Any delay is regrettable, but will prevent quibbling over the procedural propriety of the Commission's action on review.

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[7]Qwest is the only carrier to claim that the CIC solution would impose expenses unrelated to the payment of compensation; that is, it claims that the change would require modification of its tracking and billing systems. Qwest at 3, 4-6. It is hard to see how this could be so: to comply with current rules Qwest must have billing and tracking capability (or purchase the function elsewhere) and it must have the ability to bill and track on behalf of both switch-based and switchless resellers. Nothing in the CIC proposal would require it to develop any additional capabilities.

[8]See TRA at 4-6; Sprint at 2-3; Cable & Wireless at 1-4; ITA at 3-5.

CONCLUSION

For the foregoing reasons, the Commission should promptly clarify its existing rules, publish a notice or rulemaking, and adopt the CIC solution proposed by the Coalition in its Petition for Clarification.

Respectfully submitted,

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Counsel for the RBOC/GTE/SNET
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June 1, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of June 1999, I caused one copy of the foregoing "Reply Comments of the RBOC/GTE/SNET Payphone Coalition on Its Petition for Clarification" of Ameritech, Bell Atlantic Corporation, BellSouth Corporation, GTE Service Corporation, SBC Communications Inc., and U S WEST, Inc. to be served upon the parties listed on the attached service list by first class mail or, where indicated by asterisk, by hand delivery.

Aaron Panner

FEDERAL COMMUNICATIONS COMMISSION
Implementation of the Pay Telephone Reclassifications and Compensation Provisions of the Telecommunications Act of 1996
CC Docket No. 96-128
NSD File No. L-99-34

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